

March 11, 2016

BY ELECTRONIC SUBMISSION

Securities Act of 1933

Section 5

Rule 144

David Fredrickson, Chief Counsel
Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Bank of America Merrill Lynch: Request for Rule 144 Interpretive Guidance

Dear Mr. Fredrickson:

On behalf of our clients, Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated and their affiliates (“**Bank of America Merrill Lynch**”), we are seeking interpretive guidance with respect to the application of Rule 144 under the Securities Act of 1933 (the “**Securities Act**”) to the exchange of units in an umbrella partnership into shares of the parent real estate investment trust (the “**REIT**”). Specifically, we are seeking guidance on the application of Rule 144 to the following fact pattern:

- All of the REIT’s investments (i.e., its real estate assets) are acquired and owned directly or indirectly by its umbrella partnership, which is organized as a limited partnership;
- The umbrella partnership is the entity through which the REIT operates its business and is referred to as the operating partnership (the “**OP**”);
- The REIT owns interests (“**OP Units**”) in the OP, which interests are the only material assets of the REIT, and the REIT serves as the general partner (“**GP**”) of the OP (or controls the GP);
- Other investors (“**Unit Holders**”) also own OP Units that were acquired in non-public offerings, typically in exchange for real estate assets they contributed to the OP;
- Unit Holders pay the full purchase price for the OP Units at the time the OP Units are acquired from the OP;
- One OP Unit is the economic equivalent of one share of common stock of the REIT (“**REIT Common Stock**”) (or such other fixed number of shares of REIT Common Stock that maintains economic parity between REIT Common Stock and OP Units);
- OP Units are substantially identical to REIT Common Stock in that they represent the same right to the same proportional interest in the same underlying pool of assets;

- The REIT Common Stock is registered under Section 12 of the Securities Exchange Act of 1934 (the “**Exchange Act**”) and is publicly traded on a national securities exchange;
- There is no public market for OP Units and the agreement governing the formation of the OP (the “**OP Agreement**”) contains significant restrictions on the transferability of OP Units;
- After an initial one-year holding period, Unit Holders may request that the OP redeem OP Units for cash, at which time the REIT may, at its option, assume the redemption obligation and exchange the OP Units for shares of REIT Common Stock (based on a fixed ratio that is adjusted to maintain economic parity between REIT Common Stock and OP Units);¹ and
- Unit Holders are not required to pay any additional consideration for REIT Common Stock at redemption, and the cash value of the OP Unit at redemption directly corresponds to the REIT Common Stock’s market value at that time.

We hereby request that the staff of the Division of Corporation Finance (the “**Staff**”) concur with our view that, under the facts described in this letter, a Unit Holder’s Rule 144(d) holding period for REIT Common Stock acquired upon an exchange of OP Units for such stock commences upon the Unit Holder’s acquisition of the OP Units. We are not requesting interpretive guidance with respect to whether, and if so when, there is an offer and sale of REIT Common Stock under the Securities Act.

I. BACKGROUND: REIT STRUCTURE

The REIT is a real estate investment trust whose only material assets are its partnership interests, or OP Units, in an OP. All of the REIT’s real estate properties are held directly or indirectly by the OP, which operates and collects all of the income from the properties. The REIT is the GP of the OP (or controls the GP) and the majority holder of OP Units. Other Unit Holders hold OP Units, which they acquired in non-public offerings in exchange for real estate assets contributed to the OP or other consideration. By exchanging real estate assets for OP Units, these Unit Holders are able to defer taxes payable on the gains from the sale of such real estate. Such taxes become due upon the sale of OP Units, the redemption of OP Units for cash, or the exchange of OP Units for REIT Common Stock.

At the time the OP is formed, the REIT conducts an initial public offering and the REIT Common Stock is listed on a national securities exchange. In contrast, OP Units are subject to contractual restrictions on transferability pursuant to the terms of the OP Agreement and are

¹ Because OP Units are the economic equivalent of REIT Common Stock, in the event of a stock split, stock dividend, recapitalization or similar capital adjustment by the REIT, the redemption ratio is adjusted to maintain economic parity between REIT Common Stock and OP Units.

restricted securities for purposes of Rule 144. The OP Agreement provides liquidity for Unit Holders by permitting Unit Holders to redeem OP Units after an initial one-year holding period and prohibits redemptions during the initial holding period to avoid triggering the Securities and Exchange Commission's (the "**Commission**") "roll-up" rules for finite-life partnerships. Upon redemption, the OP redeems the OP Unit for cash, or the REIT, at its sole option, may assume the redemption obligation and exchange the OP Units for REIT Common Stock. Because REIT Common Stock is the economic equivalent of the OP Unit, the cash value of the OP Unit at redemption is the market price of the REIT Common Stock at the time of redemption.

If the REIT chooses to provide REIT Common Stock upon redemption of OP Units, the OP Units are exchanged for REIT Common Stock at a ratio of 1:1 (or another fixed ratio that maintains economic parity between the REIT Common Stock and the OP Units) because the resulting REIT Common Stock represents the same percentage right to the pool of assets held by the OP as does one OP Unit. Indeed, assuming liquidation of the REIT and the OP, holders of REIT Common Stock and OP Units would be entitled to the same percentage right to the distributable profits of the OP upon dissolution of the OP. The REIT Common Stock received upon redemption is therefore economically equivalent to the redeemed OP Unit.² For purposes of this letter, we have assumed that neither the issuance of REIT Common Stock upon the exchange of OP Units nor the resale of REIT Common Stock issued upon the exchange of OP Units is registered under the Securities Act.

Unit Holders may decide to exercise their redemption rights for a number of reasons, including, but not limited to, monetizing their OP Units, diversifying or readjusting their asset or investment portfolio, or furthering tax or estate planning goals or objectives. Because, as described above, no public market exists for the sale or exchange of OP Units, Unit Holders seeking to achieve these goals generally must exercise their redemption rights. A Unit Holder may decide to defer the redemption of OP Units for various reasons, including furthering tax or estate planning goals or objectives.

II. DISCUSSION

A. General Application of Rule 144

Rule 144 provides a non-exclusive safe harbor from the definition of "underwriter" in Section 2(a)(11) of the Securities Act. If a person who is not an issuer of securities or a securities dealer is not an "underwriter" in connection with a sale of securities, that person is generally

² As an example, assume an OP has 100 OP Units outstanding, 70 of which are held by the REIT and 30 of which are held by other Unit Holders. The REIT would have 70 shares of REIT Common Stock outstanding. Effectively, the holders of REIT Common Stock would have an interest in 70% of the OP assets and the minority Unit Holders would have a 30% interest in the OP assets. If the Unit Holders elect to redeem their OP Units and the REIT elects to issue REIT Common Stock in exchange for the OP Units, the 30 OP Units held by the minority Unit Holders will be converted into 30 shares of REIT Common Stock. If all 30 OP Units were converted, there would be 100 shares of REIT Common Stock outstanding and 100 OP Units outstanding, all held by the REIT. The holders of the 30 shares of REIT Common Stock received upon conversion of the 30 Units would still have a 30% interest in the OP assets.

eligible to enter into that sale of securities without registration under the Securities Act in reliance on the exemption from registration found in Section 4(a)(1) of that Act (as that provision exempts “transactions by any person other than an issuer, underwriter, or dealer”). A person satisfying the conditions of Rule 144 may therefore be certain (absent a scheme to evade registration) that the Section 4(a)(1) exemption is available for that sale of securities.

Rule 144(b) provides the conditions that must be met for sales of restricted securities under the Rule 144 safe harbor. Among other requirements (including certain requirements applicable to affiliates of the issuer), Rule 144(b) provides that a person may rely on the safe harbor if the holding period requirement set out in Rule 144(d)(1) has been satisfied. The relevant Rule 144(d)(1) holding periods are as follows: (i) if the REIT is, and has been for at least 90 days prior to the sale, subject to the reporting requirements of the Exchange Act, a minimum of six months must elapse between the date of the acquisition of the securities and any resale of such securities; and (ii) if the REIT has not been subject to the reporting requirements of the Exchange Act for at least 90 days prior to the sale, a minimum of one year must elapse between the date of the acquisition of the securities and any resale of such securities. For the reasons set forth below, we believe that a Unit Holder’s Rule 144(d) holding period for REIT Common Stock acquired upon an exchange of OP Units for such stock commences upon the Unit Holder’s acquisition of the OP Units, rather than at the time the REIT Common Stock is acquired.

B. Commencement of Rule 144 Holding Period for REIT Common Stock

It is well-settled that the Rule 144(d)(1) holding period generally commences at the time a person acquires and pays the full purchase price for a security. And it is similarly well-settled that the holding period requirement is intended to ensure that a holder of restricted securities has assumed the economic risks of an investment, such that the person is not acting as a conduit for the sale to the public of unregistered securities on behalf of the issuer. Because the OP Unit and REIT Common Stock acquired upon redemption represent the same proportionate right to the assets of the OP, we believe that the exchange does not result in any change to the economic risk of the investment in the underlying assets.³

Like the facts presented in *L. Perrigo Company*, the exchange of OP Units for REIT Common Stock precisely replicates the proportional share of the real estate assets owned by the Unit Holder; OP Units are exchanged for REIT Common Stock at a ratio of 1:1 (or another fixed ratio that maintains economic parity between the REIT Common Stock and the OP Units) because the resulting share of REIT Common Stock represents an identical percentage right to the pool of assets held by the OP as does one OP Unit. The Unit Holder therefore has the same economic risk as a holder of REIT Common Stock during the entire period it holds the OP Units, and the Unit Holder retains the same economic risk and the same proportionate share of the underlying real estate assets after the exchange. In other words, from the date that the Unit Holder pays the full purchase price for the OP Units to the date of the exchange of the OP Units

³ See, e.g., *L. Perrigo Company*, SEC No-Action (November 21, 1993); cf. Securities Act Rules Compliance and Disclosure Interpretation 132.12 (January 26, 2009).

for REIT Common Stock, the economic value of an OP Unit is the same as the market price of, and therefore the economic value of, a corresponding share of REIT Common Stock. Therefore, the Rule 144(d) holding period for REIT Common Stock acquired upon an exchange of OP Units for such stock should commence upon the Unit Holder's acquisition of the OP Units.

III. CONCLUSION

We hereby request that the Staff concur with our view that, under the facts described in this letter, a Unit Holder's Rule 144(d) holding period for REIT Common Stock acquired upon an exchange of OP Units for such stock commences upon the Unit Holder's acquisition of the OP Units.⁴ Our request for guidance is limited to the UPREIT structure described above and does not extend generally to other situations where a security is exchangeable for the security of another issuer.

If you have any questions or otherwise require additional information, please contact Robert Plesnarski (202.383.5149) of O'Melveny & Myers LLP, Glen Rae (646.855.2556) of Bank of America Merrill Lynch, Peter Romeo (202.637.5805) of Hogan Lovells US LLP or Brian Breheny (202.371.7180) of Skadden, Arps, Slate, Meagher & Flom LLP. Thank you for your attention to this matter.

⁴ Granting our request would be consistent with the issuance by the Commission of two orders under Section 12(h) of the Exchange Act that exempted two REITs having an UPREIT structure from the application of Section 16 of that Act to their ownership of, and transactions in, units of their operating partnerships. *See* In the Matter of Charles E. Smith Residential Realty, Inc., Exchange Act Release No. 34-36080 (August 10, 1995), 59 SEC Docket 2496-264, File No. 81-294; In the Matter of Summit Properties Inc., Exchange Act Release No. 34-40059 (June 3, 1998), SEC Docket 584-21, File No. 81-926.

Sincerely,

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